IC 99-1
Tax Type: Invested Capital Tax
Issue: Invested Capital Tax (Long Term Debt)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, Petitioner **v.** **"RFE TRANSMISSION, CORP., D/B/A "CELLULAR, INC.",** **Taxpayer**	**No. 97-ST-0000** **Linda K. Brongel[1] Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Duane A. Feurer of Ross & Hardies, for taxpayer; Charles Hickman, Special Assistant Attorney General, for the Department of Revenue.

SYNOPSIS:

This matter comes on for hearing upon stipulated facts and memoranda of law by agreement of the parties. "RFE Transmission Corp.", d/b/a "Cellular, Inc." (hereinafter "taxpayer") filed invested capital tax returns in Illinois for the 1993 through 1996 calendar years and paid the tax. Taxpayer filed claims for refund for the invested capital tax paid for the years 1993 through 1996. The Department denied taxpayer's claims.

The issue herein is whether cellular telephone service providers are subject to the invested

[1] The administrative law judge hearing this case is on a leave of absence, accordingly this recommendation has been written by another ALJ. Inasmuch as the case has been presented on fully stipulated facts, credibility of witnesses is not an issue.

capital tax as provided by 35 **ILCS** 610/2a.1. On consideration of this matter, it is my recommendation that taxpayer's claims for refund be denied.

FINDINGS OF FACT:

1. Taxpayer provides cellular telephone service in Rural Service Districts 8 and 9 in "Area 51" Illinois. Stip. ¶4, Stip. ¶5, attachment

2. Resellers of cellular services purchase air time wholesale from taxpayer and sell it to businesses or individuals, but are not required to pay invested capital tax since they are not telecommunications carriers as defined by §5/13-202 of the Universal Telephone Service Protection Law of 1985 (220 **ILCS** 5/13-202). Stip. ¶6

CONCLUSIONS OF LAW:

The invested capital tax is imposed on public utilities in Illinois as part of the replacement of the personal property tax which was abolished in 1979. The invested capital tax was enacted by Pub. Act 81-1st Sp. Sess. 1^2 as an amendment to the Messages Tax Act (35 **ILCS** 610/1 *et seq.*) at 35 **ILCS** 610/2a. Together with the replacement income tax, which was also imposed by the same Public Act, the two taxes were intended to replace the revenue lost by the abolition of ad valorem personal property taxes. Pub. Act 81-1st Sp. Sess. 1.

Taxpayer is a cellular telephone service provider who filed and paid the invested capital tax for the years 1993 through 1996 and filed claims for refund of the total amount of tax paid. This case arises as a result of the Department's denial of its claims. In its brief, taxpayer raises several arguments as to why cellular telephone service providers should not be subject to the invested capital tax.

I

First, taxpayer argues that the cellular industry is not regulated by the Illinois Commerce Commission (hereinafter "ICC") and therefore is exempt from the invested capital tax.

35 **ILCS** 610/2a states:

> Imposition of tax on invested capital. In addition to the taxes imposed by the Illinois Income Tax Act, there is hereby imposed upon persons engaged in the business of transmitting messages and acting as a retailer of telecommunications as defined in Section 2 of the Telecommunications Excise Tax Act..., an additional tax in an amount equal to .8% of such person's invested capital for the taxable period...The invested capital tax imposed by this Section shall not be imposed upon persons who are not regulated by the Illinois Commerce Commission or who are not required, in the case of telephone cooperatives, to file reports with the Rural Electrification Administration. (emphasis added)[3]

Taxpayer argues that cellular companies are not subject to the active regulatory oversight of the ICC, and therefore, the invested capital tax cannot apply. In ICC Docket #85-0477, 1987 Ill. PUC LEXIS 10, the ICC ruled that Chicago SMSA Limited Partnership, a cellular telephone service provider, could be excluded from the tariff provisions of the Public Utility Act.[4] The ICC found that in the Chicago Standard Metropolitan Statistical Area ("SMSA") two cellular carriers and six resellers of cellular telephone service provide sufficient competition so that cellular telephone service could be excluded from active regulatory oversight. The ICC also ruled, however, that all other provisions of the Public Utility Act remain applicable to Chicago SMSA.

More recently, in Chicago SMSA L.P. v. Illinois Commerce Commission, 284 Ill. App. 3d 326 (3d Dist. 1996), the Appellate Court decided, contrary to the ICC's determination in Docket # 85-0477, that cellular telephone service providers are not subject to the Public Utility Tax. In its

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[2] This legislation also imposed invested capital taxes on electric utilities (35 **ILCS** 620/1 *et seq.*), natural gas utilities (35 **ILCS** 615/1 *et seq.*), and water companies (35 **ILCS** 625/1 *et seq.*).
[3] That part of the statute providing that the invested capital tax shall not be imposed on companies not regulated by the ICC became effective September 6, 1991.
[4] 220 **ILCS** 5/1-101 *et seq.*

opinion, the court held that since cellular telephone service providers are not subject to the tariff provisions of the Public Utility Act, they have no gross revenues which are subject to tax.

In addition, the United States Congress amended the Federal Communications Act[5] to prohibit the states from regulating the rates or market entry or exit of cellular service providers thereby further limiting the ICC's authority to regulate cellular service providers.

Taxpayer maintains that since the ICC may not regulate the rates or the market entry or exit of cellular service providers by federal preemption, nor are they subject to the public utility tax which is regulated by the ICC, then cellular providers are "not regulated by the Illinois Commerce Commission."

The Department has counter-argued that even though cellular companies are not subject to active regulatory oversight, they are nevertheless regulated by the ICC. Section 13-101 of Universal Telephone Service Protection Law of 1985[6] states:

> Except to the extent modified or supplemented by the specific provisions of this Article, the Sections of this Act pertaining to public utilities, public utility rates and services, and the regulation thereof, are fully and equally applicable to noncompetitive telecommunications rates and services, and the regulation thereof, except where the context clearly renders such provisions inapplicable. Except to the extent modified or supplemented by the specific provisions of this Article, Articles I through V, Sections 9-221, 9-222, 9-222.1, 9-222.2 and 9-250, Articles X and XI of this Act are fully and equally applicable to competitive telecommunications rates and services, and the regulation thereof. (emphasis added) 220 **ILCS** 5/13-101.

The above-cited articles, which the legislature has determined are applicable to competitive telecommunications services (i.e., cellular service providers), provide for the filing of information reports with the ICC, the power of the ICC to investigate, on its own motion or upon complaint, any rate, charge, or practice of a public utility to determine if any of them are unjust, unreasonable

[5] 47 U.S.C. §332(c)(3), effective August 1994.
[6] 220 **ILCS** 5/13-100 *et seq.*, formerly Ill. Rev. Stat. 1991, ch. 111 2/3, ¶ 13-100.

or discriminatory, and the power of the ICC to hold hearings and dispose of complaints relating to public utility matters.

Since the term "regulate" is not defined in the statute, we must look at the plain meaning of the words. According to Webster's New Dictionary of the English Language, "regulate" means "[t]o control or direct according to a rule." Even though the ICC may no longer impose the public utility tax on cellular companies, or control the setting of rates, or market entry or exit, the ICC still has the power to control cellular service providers as set forth above.

In fact, the ICC recently exercised its power to regulate cellular service providers in Citizens Utility Board v. Illinois Bell Telephone Company, ICC Docket No. 97-0192; 97-0211 (Consol.), 1998 Ill. PUC LEXIS 368. In Citizens Utility Board, the ICC ordered cellular service providers to institute number pooling. At issue was the possible exhaustion of telephone numbers in the 847 area code due to the way numbers were being assigned to the various telecommunications carriers. By virtue of the ICC's ruling in this matter, in which the ICC ordered Illinois Bell Telephone and all wireless carriers to implement number pooling for all Chicago area codes, it is clear that the ICC still has the power to regulate cellular service providers.

There is nothing in the Messages Tax Act which supports taxpayer's contention that limited regulation is not regulation. Where the plain language of the statute is unambiguous, it is unnecessary to examine legislative intent.

> 'There is no rule of [statutory] construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports' (Western National Bank v. Village of Kildeer (1960), 19 Ill.2d 342, 350), and it is not a court's function to ''read into a statute exceptions, limitations, or conditions which depart from its plain meaning'' (In re Estate of Swiecicki (1985), 106 Ill.2d 111, 120, quoting Belfield v. Coop (1956), 8 Ill,2d 293, 307). People v. Hare, 119 Ill.2d 441, 447 (1988).

Since cellular service providers continue to be regulated by the ICC, by the plain language of the statute they are subject to the invested capital tax.

While the term "not regulated by the Illinois Commerce Commission" appears clear, assuming, arguendo, that the taxpayer is correct that the statute is ambiguous, it then becomes necessary to resort to an analysis of legislative intent. It is presumed that when the legislature uses different terms different results are intended. Yiadom v. Kelly, 204 Ill. App. 3d 418, 430 (1st Dist. 1990). In the Universal Telephone Service Protection Law of 1985, the legislature specifically empowered the ICC to exclude from "active regulatory oversight" cellular service providers when it was in the public interest. Section 13-203 states:

> The Commission [ICC] may, by rulemaking, exclude (1) private line service which is not directly or indirectly used for the origination or termination of switched telecommunications service, (2) cellular radio service, (3) high-speed point-to-point data transmission at or above 9.6 kilobits, or (4) the provision of telecommunications service by a company or person otherwise subject to Section 13-202(c), from active regulatory oversight to the extent it finds, after notice, hearing and comment that such exclusion is consistent with the public interest and the purposes and policies of this Article. To the extent that the Commission has excluded cellular radio service from active regulatory oversight for any provider of cellular radio service in this State pursuant to this Section, the Commission shall exclude all other providers of cellular radio service in this State from active regulatory oversight without an additional rulemaking proceeding where there are 2 or more certified providers of cellular radio service in a geographic area. (emphasis added)
> 220 **ILCS** 5/13-203

Since the legislature used the terminology "active regulatory oversight," it is reasonable to assume that they would have used the same language in the Messages Tax Act if they intended to exclude cellular service providers from the invested capital tax. Instead, the legislature used the term "not regulated by the Illinois Commerce Commission." Accordingly, this term must have a different meaning.

More persuasively, the legislative history of the amendment to §2a of the Messages Tax Act, which added the language "not regulated by the Illinois Commerce Commission," indicates it

was meant to exclude owners of commercial office buildings who resell utilities to their tenants from the invested capital tax. Senator Cullerton stated:

> This Bill concerns the applicability of the Illinois invested capital tax to commercial office building [sic] which resell electricity to building tenants. The Department of Revenue has agreed the invested capital tax does not, nor has it ever been intended to, apply to these buildings that resell utilities services to tenants, because they are not considered public utilities. And the purpose of the Bill is simply to clarify the intent of the invested capital tax legislation.
> Senate Transcript, June 20, 1991, page 166.[7]

The invested capital tax was imposed on electric utilities (35 **ILCS** 620/1 *et seq.*), natural gas utilities (35 **ILCS** 615/1 *et seq.*), and water companies (35 **ILCS** 625/1 *et seq.*), and telecommunications companies (35 **ILCS** 610/1 *et seq.*). Although Senator Cullerton's remarks were directed to electric service, the same amendment was made to each of the aforementioned acts by Public Act 87-205. Thus, I conclude that the legislature did not intend for cellular telephone service providers, such as taxpayer, to be excluded from the provisions of the invested capital tax.

Taxpayer also argues that language in the Telecommunications Municipal Infrastructure Maintenance Fee Act[8] (hereinafter "Fee Act") demonstrates the legislative intent in enacting the amendment at issue. The Fee Act was enacted by Public Act 90-154 on July 23, 1997, effective January 1, 1998 and repealed the invested capital as applied to telecommunications carriers replacing it with a "State Telecommunication Infrastructure Maintenance Fee." Section 5 of the Fee Act, titled Legislative Intent, states as follows:

> The General Assembly imposed a tax on invested capital of utilities to partially replace the personal property tax that was abolished by the Illinois Constitution of 1970. Since that tax was imposed, telecommunications retailers have evolved from utility status into an increasingly competitive industry serving the public. This Act is intended to abolish the invested capital tax on telecommunications retailers ([sic] that is, persons engaged in the business of transmitting messages and acting as a retailer of telecommunications as defined in Section 2 of the Telecommunications

[7] See also, House Transcript, June 27, 1991, pages 113-114, remarks of Representative Currie to the same effect.
[8] 35 **ILCS** 635/1 *et seq.*

> Excise Tax Act. Cellular Telecommunications retailers have already been excluded from application of the invested capital tax by earlier legislative action…. (emphasis added) 35 **ILCS** 635/5.

There are two lines of cases that deal with the import to be given a statement of legislative intent made by a subsequent legislature. Each party cites conflicting cases which were summed up in Dominick's Finer Foods, Inc. v. Makula, 217 B.R. 550, 556 (E.D., N.D., Ill. 1997). The Court quoted from Roth v. Yackley, 77 Ill.2d 423 (1979), that a legislature's "subsequent declaration of prior intent cannot alter the clear import of the prior statutory language," and also, that the "clear and unambiguous statutory language provides a better indicator of original legislative intent than does a subsequent amendment, which ... is equivocal in nature and may indicate either a change in policy by the legislature or its intent to correct an erroneous interpretation of the statute," from People v. Hare, 119 Ill.2d 441 (1988). But where terms in a statute were ambiguous, and where the legislature, without changing the substantive language of the statute, clarifies the previously ambiguous terms, and where Illinois courts had not interpreted the statute to resolve the ambiguity, it was appropriate to apply the interpretation given by the subsequent legislature. Commonwealth Edison Co. v. Department of Local Gov't Affairs, 85 Ill.2d 495 (1981).

In a case such as this one, where the language is straightforward and there is legislative history which sheds light on the legislature's intent in passing the statute, it is inappropriate to adopt the later legislature's interpretation of the earlier legislature's intent as taxpayer urges. Accordingly, it is my opinion that the ICC has retained jurisdiction over cellular service providers, and therefore, for purposes of 35 **ILCS** 610/2a, cellular service providers are not excluded from the invested capital tax as "not regulated by the Illinois Commerce Commission."

II

Second, taxpayer argues that its business is in interstate commerce and therefore is exempt from the invested capital tax. To support this proposition, taxpayer cites Illinois Bell Telephone Co. v. Allphin, 93 Ill.2d 241 (1982) and Answer Iowa, Inc. v. Department of Revenue, 161 Ill. App. 3d 247 (4th Dist. 1987). Both cases deal with the validity of the Messages Tax Act and hold that the imposition of the messages tax without segregation of taxable intrastate messages from exempt interstate messages is not permissible.

Since the invested capital tax was enacted in 1979 as an amendment to the Messages Tax Act, taxpayer argues that the cases which apply to the messages tax apply with equal force to the invested capital tax. Coextensive with this argument is the premise that the appropriate Commerce Clause[9] analysis is the examination of pre-1945 federal case law (the Messages Tax Act having been enacted in 1945) regarding the taxation of interstate commerce. *See* Illinois Bell, 93 Ill.2d 241 (1982); Answer Iowa, 161 Ill. App. 3d 247 (4th Dist. 1987). However, taxpayer's argument fails for several reasons.

> As originally enacted, the provision imposing the messages tax read as follows:
>
> > §2. A tax is imposed upon persons engaged in the business of transmitting messages in this State at the rate of three percent (3%) of the gross receipts from such business....However, such tax is not imposed on the privilege of engaging in any business as interstate commerce or otherwise to the extent such business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State. (emphasis added) (former Ill. Rev. Stat. ch. 120, ¶467.2)

First, only the messages tax was declared invalid by the Court in Illinois Bell, not the entire Messages Tax Act. Initially, it should be noted that the object of the invested capital tax differs from that of the messages tax. The invested capital tax is imposed on "persons engaged in the business of transmitting messages and acting as a retailer of telecommunications" in an amount equal to .8% of taxpayer's invested capital; whereas the messages tax was imposed on "persons engaged in the business of transmitting messages in this State," and was based on gross receipts.

[9] U.S. Constitution, Article I, §8, cl. 3.

Even though the invested capital tax was enacted as §2a of the Messages Tax Act, the statutory language of the provision imposing the message tax differs from that imposing the invested capital tax, and it is the statutory language which controls.

Further, the Illinois Supreme Court in Illinois Bell, 93 Ill.2d 241 (1982), found that the language in the first sentence of §2 of the Messages Tax Act was ambiguous. In order to determine whether "in this State" modified "persons" or "transmitting messages," the Court found it necessary to analyze the emphasized language above and held that the legislature intended that Constitutional law at the time the statute was enacted should apply.

There is no language in the statute enacting the invested capital tax which is comparable to the language in former §2 of the Messages Tax Act, emphasized above. Since 1945, case law has evolved regarding the commerce clause, and it is today's standards that should be applied to the invested capital tax. Goldberg v. Johnson, 117 Ill.2d 493 (1987). In Goldberg, the Illinois Supreme Court upheld the telecommunications excise tax, which was enacted to replace the messages tax, and found that: "[w]e agree with the parties that the four-part test enunciated by the Supreme Court in Complete Auto controls our decision on the commerce clause issue." (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)) *Id* at 500. *See*, Square D Co. v. Johnson, 233 Ill. App. 3d 1070 (1st Dist. 1992). What's more, the language imposing the invested capital tax is unambiguous and therefore, the analysis of the Illinois Bell court is unnecessary.

Ultimately, the language of the statute must control, and the language of the section imposing the invested capital tax differs from that which imposed the messages tax. The restrictive language of the now-repealed §2 of the Messages Tax Act cannot be read in as a limitation to §2a where no such restriction was imposed by the legislature.

Therefore, I find that the appropriate Commerce Clause analysis is the four-step test set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), that is, before a tax may be imposed upon an instrumentality of interstate commerce, a court must consider whether: (1) the tax is applied to an activity having a substantial nexus with the taxing State; (2) the tax is fairly

apportioned; (3) the tax discriminates against interstate commerce; and (4) the tax is fairly related to the services provided by the State.

There is no question that taxpayer has substantial nexus with Illinois. It owns transmitting equipment within the state and transmits messages having an Illinois origination or destination. Second, the same apportionment percentage which is used to measure the taxpayer's business activity in Illinois for income tax purposes is used to apportion the invested capital tax so that the tax is fairly apportioned. The tax does not discriminate against interstate commerce since all cellular service providers are subject to the tax regardless of whether the messages are solely intrastate or are some combination of interstate and intrastate. Finally, since the taxpayer provides services to Illinois subscribers, taxpayer enjoys the protection of Illinois laws, access to the courts, protection of police and fire departments and other services which the State provides its residents. It is not necessary under the Complete Auto test that a precise accounting be made, only that the tax is fairly related to services provided by the state. Commonwealth Edison Company v. Montana, 453 U.S. 609 (1981). Thus, the relevant four-prong test under Complete Auto Transit is met by the invested capital tax.

III

Finally, taxpayer contends that the Department of Revenue does not impose the invested capital tax on resellers of cellular telephone service, and therefore, has violated the uniformity requirement of Art. IX, Sec.2 of the Illinois Constitution.

Article IX, Sec. 2 states:

> In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

Cellular telephone service providers are "telecommunications carriers" as defined by The Universal Telephone Service Protection Law of 1985,[10] and are thereby subject to the jurisdiction of the Illinois Commerce Commission. Resellers, on the other hand, are not, by definition, telecommunications carriers (see footnote 12). Taxpayer owns the equipment which transmits the radio signals while the resellers buy the air time from the service providers and sell it to the public. Therefore, resellers are not subject to regulation by the ICC.

The Illinois Supreme Court in Searle Pharmaceuticals, Inc. v. Department of Revenue, 117 Ill.2d 454 (1987) established a two-part test to determine if a tax meets the uniformity requirement: 1) the classification must be based on a real and substantial difference between the people taxed and those not taxed, and 2) the classification must bear some reasonable relationship to the object of the legislation or to public policy.

Even though the cellular service providers' customers may include those of the resellers, the fact that cellular service providers are both owners of the equipment transmitting the messages and are regulated by the ICC is sufficient to establish that there is a real difference between the two. Further, the invested capital tax was imposed on regulated utilities as a replacement to the personal property tax. These utilities were substantial contributors to the property tax base, so that the classification bears a reasonable relationship to the object of the replacement taxes. See also, Square D Co. v. Johnson, 233 Ill. App. 3d 1070 (1st Dist. 1992). Therefore, the invested capital tax meets the Searle test and does not violate the uniformity clause of the Illinois Constitution.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Denial should be finalized, and taxpayer's claims are hereby denied.

[10] 220 **ILCS** 5/13-202, formerly Ill. Rev. Stat. 1991, ch. 111 2/3, ¶13-202.

Date: 4/19/99

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Linda K. Brongel
Administrative Law Judge